

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID L. GRAY,

Petitioner,

v.

RENEE BAKER, *et al.*,

Respondents.

Case No. 2:13-cv-01629-RFB-CWH

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by petitioner David L. Gray, a Nevada state prisoner. Before the Court is respondents' motion to dismiss the petition. ECF No. 9.

I. PROCEDURAL HISTORY

On September 8, 2008, in the Eighth Judicial District for the State of Nevada, the State filed an information charging petitioner with conspiracy to commit burglary, burglary, conspiracy to commit robbery, and two counts of robbery. Exhibit 2.¹ On November 5, 2008, at calendar call, the jury trial was vacated and the matter was set for a status check. Exhibit 3. On November 26, 2003, the State

¹ The exhibits referenced in this order are found in the Court's record at ECF No. 11.

1 filed an amended information which charged petitioner with robbery and conspiracy to commit robbery.
2 Exhibit 4. The same day, a guilty plea agreement was filed. Exhibit 5.

3 On April 13, 2009, petitioner informed the state district court that he wished to withdraw his
4 plea and requested that counsel be appointed for the limited purpose of determining if there was a basis
5 to withdraw his plea. Exhibit 7. The court appointed Cynthia Dustin, who was confirmed as
6 petitioner's attorney on April 15, 2009. Exhibit 8. On May 15, 2009, petitioner filed a motion to
7 withdraw his guilty plea, which the state opposed. Exhibits 9, 10. On July 8, 2009, the state district
8 court denied the motion to withdraw the guilty plea and sentenced petitioner. Exhibit 11. Petitioner
9 was sentenced to a prison term of 48-120 months for robbery and a concurrent prison term of 12-48
10 months for conspiracy to commit robbery. The court suspended both prison sentences and placed
11 petitioner on probation for 5 years. Exhibits 11, 12. Petitioner's sentence was reflected in his judgment
12 of conviction, filed September 1, 2009. Exhibit 12.

13 On September 14, 2009, petitioner was brought before the state district court on a probation
14 violation. The court found that petitioner had violated probation, but did not revoke his probation.
15 Instead, the court modified his probation conditions to add 120 days of "flat time" in jail and house
16 arrest upon completion of jail time. Exhibits 13, 14. The state district court filed an amended judgment
17 of conviction on October 22, 2009. Exhibit 14.

18 Petitioner filed a motion to modify his probation to remove the house arrest component. Exhibit
19 16. The state district court granted petitioner's motion to modify probation and, on September 3, 2010,
20 entered a second amended judgment of conviction. Exhibit 17.

21 Petitioner was again brought before the state district court on January 12, 2011, on a probation
22 violation. Exhibit 18. The court revoked petitioner's probation and, on January 20, 2011, entered a
23 third amended judgment of conviction with imposed the original prison sentences. Exhibit 19.

24 On February 2, 2011, petitioner filed a *pro se* motion to dismiss his counsel, Cynthia Dustin,
25 on the grounds that she failed to answer his calls, did not communicate with him or visit him, and was
26 not going a good job representing him. Exhibit 20. By order filed February 17, 2011, the state district
27 court denied petitioner's motion. Exhibit 21.

1 On February 25, 2011, petitioner filed a *pro se* motion to modify sentence in which he claimed
2 that he should have been convicted of grand larceny and burglary. Exhibit 22. The State opposed
3 petitioner's motion. Exhibit 23. On April 1, 2011, the state district court denied petitioner's motion
4 to modify his sentence. Exhibit 24. On August 5, 2011, petitioner filed a *pro se* motion to hold counsel
5 in contempt of court, which the state district court denied. Exhibits 25, 26.

6 Petitioner filed a post-conviction habeas petition in the state district court on November 4, 2011.
7 Exhibit 27. Petitioner alleged two grounds for relief: (1) that he was denied the effective assistance of
8 counsel on or about August of 2009 when he told his counsel to appeal the entry of his judgment of
9 conviction but she failed to do so; and (2) that in November of 2008 when he pled guilty, he didn't want
10 to plead to robbery or conspiracy to commit robbery because he felt that was not the crime he
11 committed and his prior counsel, Michael Sanft, and District Attorney Krista Barrie lied to the court
12 about the factual basis for the plea. *Id.* at 7-10. The State filed a response and motion to dismiss on
13 grounds that the petition was time-barred but agreed that petitioner was entitled to an evidentiary
14 hearing regarding counsel's alleged failure to file an appeal. Exhibit 28. Petitioner filed an opposition
15 to the motion to dismiss the petition. Exhibit 29.

16 On February 3, 2012, the state district court held an evidentiary hearing on the habeas petition.
17 Exhibit 30. In a written order filed March 20, 2012, the state district court ruled that the post-conviction
18 habeas petition was untimely. Exhibit 32. The state district court's order went on to find that
19 petitioner's claim of ineffective assistance of counsel—specifically, petitioner's contention that he
20 asked his attorney to file an appeal but she did not—was belied by the record, based on testimony given
21 at the evidentiary hearing. *Id.* Petitioner filed a notice of appeal from the denial of his post-conviction
22 habeas petition. Exhibits 31, 33.

23 On July 26, 2012, petitioner filed a motion to modify and/or correct an illegal sentence. Exhibit
24 34. The state district court heard the motion on September 5, 2012, and entered its order denying the
25 motion on October 9, 2012. Exhibit 39. Petitioner filed a notice of appeal from the district court's
26 denial of his motion to modify and/or correct an illegal sentence. Exhibit 37.

1 On October 5, 2012, while the appeal from the denial of petitioner's motion to modify and/or
2 correct an illegal sentence was pending, petitioner filed a motion to reconsider the revocation of his
3 probation. Exhibit 38. The state district court denied the motion on the grounds that it lacked
4 jurisdiction while the appeal from the denial of the July 26, 2012 motion to modify was pending.
5 Exhibit 40.

6 By order filed December 12, 2012, the Supreme Court of Nevada affirmed the denial of
7 petitioner's post-conviction habeas petition. Exhibit 41. The Court found that the petition was untimely
8 and that petitioner failed to demonstrate cause for the delay and undue prejudice. Id. Remittitur issued
9 on January 7, 2013. Exhibit 42.

10 On June 13, 2013, the Supreme Court of Nevada affirmed the denial of petitioner's July 26,
11 2012 motion to modify and/or correct an illegal sentence. Exhibit 43. Remittitur issued on July 9,
12 2013. Exhibit 44.

13 Petitioner dispatched his *pro se* federal habeas petition to this Court on July 29, 2013. ECF No.
14 6 at 1, item 5. On March 19, 2014, respondents filed the instant motion to dismiss the petition. ECF
15 No. 9. Petitioner has not filed a response to the motion to dismiss the petition. On August 5, 2014,
16 Chief Judge Navarro entered a minute order reassigning this case to the undersigned United States
17 District Judge. ECF No. 13. The minute order was served on petitioner by mail at his address of
18 record, the Nevada Department of Corrections' Pioche Conservation Camp, P.O. Box 509, Pioche, NV
19 89043. Id. On August 18, 2014, the reassignment minute order was returned to the Clerk of Court as
20 undeliverable. ECF No. 14. Printed words on the face of the returned envelope state the following:
21 "Return to Sender – Attempted – Not Known – Unable to Forward." Handwritten words on the face
22 of the returned envelope state the following: "Return to Sender – no longer at address – no new address
23 available." ECF No. 14. A search of the Nevada Department of Corrections' online offender locator
24 indicates that petitioner has been released on parole, but no actual location or current address is
25 identified.² Petitioner has failed to file with this Court a written notification of his change of address
26 since his release on parole.

27
28 ² This information is found at: <http://www.doc.nv.gov/inmatesearch/form.php>

II. DISCUSSION

A. Local Rule LSR 2-2, Petitioner's Failure to Update His Address

Petitioner has failed to update this Court with his current address, as the Court's receipt of returned mail demonstrates. See ECF No. 14. Petitioner's failure to update the Court with his current address is an independent basis for dismissing this action, which the Court raises *sua sponte*. Rule LSR 2-2 of the Local Rules of Special Proceedings and Appeals provides:

The plaintiff shall immediately file with the Court written notification of any change of address. The notification must include proof of service upon each opposing party or the party's attorney. Failure to comply with this rule may result in dismissal of the action with prejudice.

District courts have the inherent power to control their dockets and "[i]n the exercise of that power they may impose sanctions including, where appropriate . . . dismissal [of a case]." Thompson v. Hous. Auth. of City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party's failure to prosecute an action, failure to obey a court order, or failure to comply with local rules. See, e.g., Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002) (dismissal of habeas corpus petition with prejudice for failure to prosecute action and failure to comply with a court order); Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-63 (9th Cir. 1992) (dismissal for failure to comply with an order requiring amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to comply with local rule requiring *pro se* plaintiffs to keep court apprised of address); Malone v. U.S. Postal Serv., 833 F.2d 128, 130-34 (9th Cir. 1987) (dismissal for failure to comply with court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to comply with local rules).

In determining whether to dismiss an action for lack of prosecution, failure to obey a court order, or failure to comply with local rules, the court must consider several factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives. Pagtalunan, 291 F.3d at 642.

1 In the instant case, petitioner failed to update the Court with his current address in compliance
 2 with LSR 2-2. The Court finds that the first two factors, the public's interest in expeditiously resolving
 3 this litigation and the Court's interest in managing its docket, weigh in favor of dismissal. The third
 4 factor, risk of prejudice to respondents, also weighs in favor of dismissal, since a presumption of injury
 5 arises from the occurrence of unreasonable delay in filing a pleading ordered by the court or prosecuting
 6 an action. See Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor—public
 7 policy favoring disposition of cases on their merits—is greatly outweighed by the factors in favor of
 8 dismissal discussed herein. Finally, given that petitioner has effectively abandoned his case and failed
 9 to notify the Court of his new address, leaving the Court and opposing counsel with no means to
 10 communicate with petitioner, no lesser alternative other than dismissal is feasible. Therefore,
 11 petitioner's failure to update the Court with his current address in compliance with LSR 2-2 is a
 12 sufficient basis for dismissal of this action. As set forth below, the untimeliness of the federal habeas
 13 petition is also an independent and separate basis to dismiss this action.

14 **B. Federal Habeas Petition is Untimely**

15 Respondents argue that the federal petition was untimely filed. The Antiterrorism and Effective
 16 Death Penalty Act (AEDPA) amended the statutes controlling federal habeas corpus practice to include
 17 a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the
 18 statute of limitations, the habeas corpus statute provides:

19 (d)(1) A 1-year period of limitation shall apply to an application for
 20 a writ of habeas corpus by a person in custody pursuant to the
 judgment of a State court. The limitation period shall run from the
 latest of—

21 (A) the date on which the judgment became final by the
 22 conclusion of direct review or the expiration of the time for
 seeking such review;

23 (B) the date on which the impediment to filing an application
 24 created by State action in violation of the Constitution or
 laws of the United States is removed, if the applicant was
 25 prevented from filing by such State action;

26 (C) the date on which the constitutional right asserted was
 27 initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made
 28 retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one of two ways—either by the conclusion of direct review by the highest court, including the United States Supreme Court, to review the judgment, or by the expiration of the time to seek such review, again from the highest court from which such direct review could be sought.” Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001). Once the judgment of conviction becomes final, the petitioner has 365 days to file a federal habeas petition, with tolling of the time for filing during the pendency of a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment. 28 U.S.C. § 2244(d)(1), (2). A habeas petitioner’s state post-conviction petition, which was rejected by the state court as untimely under the statute of limitations, is not “properly filed” within the meaning of the statutory tolling provision of the AEDPA limitations period. Pace v. DiGuglielmo, 544 U.S. 408, 412-16 (2005).

A criminal defendant in Nevada has thirty days from the entry of judgment to file his notice of appeal. Nev. R. App. P. 4(b)(1). If the defendant does not seek direct review from the highest state court, the conviction becomes final when the time for seeking such review expires. 28 U.S.C. § 2244(d)(1)(A); Hemmerle v. Schriro, 495 F.3d 1069, 1073-74 (9th Cir. 2007); Wixom, 264 F.3d at 898. Once the judgment of conviction is final, the defendant has one year to file a federal habeas petition. 28 U.S.C. § 2244(d).

In the present case, petitioner’s judgment of conviction was filed on September 1, 2009. Exhibit 12. Petitioner did not pursue a direct appeal of his judgment of conviction. Where a petitioner does not appeal from his judgment of conviction, the one-year AEDPA limitations period begins to run on the date on which the time to seek appeal expires. 28 U.S.C. § 2244(d)(1)(a). Thus, petitioner’s conviction became final on October 1, 2009, which was the deadline for filing a direct appeal from the

1 judgment of conviction. Nev. R. App. P. 4(b)(1). The one-year AEDPA statute of limitations began
2 to run on October 2, 2009, and expired one year later on October 2, 2010. The first page of the federal
3 habeas petition indicates that the petition was dispatched (given to prison staff for mailing) to this Court
4 on July 29, 2013. ECF No. 6 at 1, item 5. The Court deems petitioner's federal petition to be filed on
5 July 29, 2013. See Houston v. Lack, 487 U.S. 266, 270 (1988) (pursuant to the "mailbox rule," federal
6 courts deem the filing date of a document as the date that it was given to prison officials for mailing).
7 As such, the federal petition was filed almost three years after the AEDPA statute of limitations expired.

8 Petitioner's state post-conviction habeas petition, which was untimely filed on November 4,
9 2011, did not statutorily toll the AEDPA statute of limitations. Exhibit 27. In the order of affirmance
10 filed December 12, 2012, the Supreme Court of Nevada ruled that petitioner's post-conviction state
11 habeas petition was untimely pursuant to NRS 34.726. Exhibit 41. The Supreme Court of Nevada
12 further ruled that petitioner failed to demonstrate good cause for the delay in filing his petition and
13 failed to demonstrate that he was prejudiced by the denial of his petition as procedurally barred. Id.
14 Because it was untimely under state law, the state post-conviction habeas petition was not a "properly
15 filed application" that would toll the AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2). Pace,
16 544 U.S. at 412-16. Further, the Court notes that petitioner's state post-conviction habeas petition was
17 filed after the expiration of the AEDPA statute of limitations. An application for state post-conviction
18 relief does not toll the AEDPA statute of limitations where the petitioner files it after the AEDPA
19 statute of limitations has expired. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003). As such,
20 petitioner is not entitled to statutory tolling during the pendency of his state post-conviction habeas
21 petition. Moreover, petitioner's motion to modify his sentence (Exhibit 22) and motion to modify
22 and/or correct an illegal sentence (Exhibit 34) did not statutorily toll the AEDPA statute of limitations
23 under 28 U.S.C. § 2244(d)(2) because those motions were filed after the expiration of the AEDPA
24 statute of limitations. Ferguson, 321 F.3d at 823. The federal habeas petition was filed almost three
25 years after the AEDPA statute of limitations expired and petitioner is not entitled to statutory tolling.
26 The federal habeas petition therefore must be dismissed as untimely unless petitioner is entitled to
27 equitable tolling.

1 The United States Supreme Court has held that the AEDPA statute of limitations “is subject to
 2 equitable tolling in appropriate cases.” Holland v. Florida, 560 U.S. 631, 645 (2010). The Supreme
 3 Court reiterated that “a petitioner is entitled to equitable tolling only if he shows: ‘(1) that he has been
 4 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and
 5 prevented timely filing.” Id. at 649 (quoting Pace, 544 U.S. at 418). The petitioner bears the burden
 6 of demonstrating that he is entitled to equitable tolling. Espinoza-Matthews v. California, 432 F.3d
 7 1021, 1026 (9th Cir. 2005). “A petitioner must show that his untimeliness was caused by an external
 8 impediment and not by his own lack of diligence.” Bryant v. Arizona Att’y Gen., 499 F.3d 1056, 1061
 9 (9th Cir. 2007); see also Velasquez v. Kirkland, 639 F.3d 964, 969 (9th Cir. 2011) (a petitioner “must
 10 show that some ‘external force’ caused his untimeliness, rather than mere ‘oversight, miscalculation
 11 or negligence.’”) (quoting Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009)). “[A]
 12 garden variety claim of excusable neglect . . . such as a simple miscalculation that leads a [litigant] to
 13 miss a filing deadline . . . does not warrant equitable tolling.” Holland, 560 U.S. at 651-52 (citations
 14 omitted) (internal quotation marks omitted). A *pro se* petitioner’s lack of legal knowledge or
 15 sophistication is not, by itself, an extraordinary circumstance warranting tolling. Raspberry v. Garcia,
 16 448 F.3d 1150, 1154 (9th Cir. 2006). In the instant case, petitioner has failed to make any showing that
 17 he pursued his rights diligently and that any extraordinary circumstance prevented him from filing a
 18 timely federal habeas petition. Petitioner is not entitled to equitable tolling and the federal petition must
 19 be dismissed as untimely.

20 21 **III. CERTIFICATE OF APPEALABILITY**

22 District courts are required to rule on the certificate of appealability in an order disposing of a
 23 proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request
 24 for certificate of appealability to be filed. Rules Governing Section 2254 Cases in the United States
 25 District Courts, Rule 11(a), 28 U.S.C. foll. § 2254. In order to proceed with his appeal, petitioner must
 26 receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; Allen
 27 v. Ornoski, 435 F.3d 946, 950 (9th Cir. 2006). Generally, a petitioner must make “a substantial
 28 showing of the denial of a constitutional right” to warrant a certificate of appealability. Id. at 951; 28

1 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). To make this showing, “[t]he
2 petitioner must demonstrate that reasonable jurists would find the district court's assessment of the
3 constitutional claims debatable or wrong.” Allen, 435 F.3d at 951 (quoting Slack, 529 U.S. at 484).
4 In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
5 debatable among jurists of reason, that a court could resolve the issues differently, or that the questions
6 are adequate to deserve encouragement to proceed further. Id. In this case, no reasonable jurist would
7 find this Court’s dismissal of the petition debatable or wrong. The Court therefore denies petitioner a
8 certificate of appealability.

9
10 **IV. CONCLUSION**

11 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (ECF No. 9) is
12 GRANTED.

13 **IT IS FURTHER ORDERED** that the petition is DISMISSED WITH PREJUDICE as
14 untimely pursuant to the AEDPA statute of limitations, 28 U.S.C. § 2244(d).

15 **IT IS FURTHER ORDERED** that, on separate and independent grounds, this action is
16 DISMISSED WITHOUT PREJUDICE based on petitioner’s failure to update the Court with his current
17 address pursuant to Rule LSR 2-2 of the Local Rules of Special Proceedings and Appeals.

18 **IT IS FURTHER ORDERED** that petitioner is DENIED A CERTIFICATE OF
19 APPEALABILITY.

20 **IT IS FURTHER ORDERED** that the Clerk of Court SHALL ENTER JUDGMENT
21 ACCORDINGLY.

22 DATED this 2nd day of March, 2015.

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24 

25 **RICHARD F. BOULWARE, II**
26 **United States District Judge**
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28